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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCONINO

STATE OF ARIZONA,	Case No. CR 2006-0436
Plaintiff,	RESPONSE TO MOTION TO DISMISS
vs.	Assigned to the Hon. Danna Hendrix, Div. 1
JOSEPH MANSON, SR.,	
Defendant.	

The State of Arizona, through the undersigned deputy, responds to the defendant's motion and respectfully asks this Court to deny it because the defendant has failed to show bad faith conduct by the state. The following memorandum supports this motion. Because the defendant's motion raises an issue involving lengthy facts, the State asks the Court to allow this motion to exceed the ten-page limit imposed by Rule 35.1, Ariz. Rules of Criminal Procedure. The following memorandum supports this motion.

RESPECTFULLY SUBMITTED this ____ day of July, 2006.

TERENCE C. HANCE
COCONINO COUNTY ATTORNEY

By_____
Alexia R. Sedillo
Deputy County Attorney

COPY of the response and memorandum delivered

this _____ day of December, 2008, to:

TERENCE C. HANCE, COCONINO COUNTY ATTORNEY
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FLAGSTAFF, ARIZONA 86001-4627 (928) 779-6518

Honorable
Judge of the Coconino Superior Court, Division

Stephen R. Glazer
Coconino County Superior Court Box
Attorney for the Defendant Joseph Manson, Sr.

By

MEMORANDUM

I. FACTS AND PROCEDURAL HISTORY

On March 5, 2005, at about 10:30 p.m., Coconino County Sheriff's Deputy Robert Gambee observed a pickup truck traveling 60 miles per hour in a 40 mile per hour zone on Highway 89. He stopped the pickup truck. The driver identified himself as Joseph Manson. Deputy Gambee noticed a strong odor of alcohol on Mr. Manson's breath, slurred speech, and bloodshot, watery eyes. Checking Mr. Manson's driver's license, he discovered that it was suspended. Mr. Manson agreed to perform field sobriety tests. Mr. Manson performed the tests on a dry, flat concrete sidewalk near the pickup truck.

Mr. Manson could not keep his balance while Deputy Gambee explained the Walk and Turn test. Mr. Manson began the test before Deputy Gambee finished. He missed touching his heel to his toe on three of the first set of nine steps by about three inches and three of the second set of nine steps by about three inches.

During the One Leg Stand, Mr. Manson swayed heavily even though used his arms to balance. He stumbled on the first count, skipped the fifth count, and put his foot down on the 12th and 18th counts. During the test, Mr. Manson had a heavy sway from front to back and side to side. Mr. Manson failed to complete the test.

At 10:55, Deputy Gambee had Mr. Manson blow into a portable breath tester. Mr. Manson blew a breath alchol reading of .142. Deputy Gambee arrested Mr. Manson at 11:00 p.m. and read him his *Miranda* rights. At 11:35, Mr. Manson agreed to a breath test on the Intoxilyzer 8000. Deputy Wallace conducted the tests. At 11:39 p.m., Mr. Manson blew a .154 and then a .148 at 11:46 p.m.

On March 9, 2006, the defendant's counsel sent a letter requesting disclosure of many items to the Coconino County Attorney's office. The generic two-page letter contained 15 paragraphs listing numerous types of information. In the letter, the defendant's counsel misspelled his client's name, referring to him as "Joseph Mason, Sr." (emphasis added). The request for the

dispatch tape recordings was included in a paragraph requesting nine categories of audio or video tapes. Two days later, the state responded to this letter by informing the defendant's counsel that it had not received a charging request for the defendant. The state returned the defendant's letter enclosed. The state's letter informed defense counsel that the Coconino County Attorney's Office does not have "a repository for attorney letters regarding non-existent cases" and asked the defendant's counsel to resubmit the letter when the case was referred for charging. Following the state's response, the defendant's counsel chose to not send a letter to the agency that arrested the defendant, the Coconino County's Sheriff's Office.

On March 15, 2005, the Coconino County Sheriff's Office sent a charging request to the Coconino County Attorney's Office. On March 30, 2005, the Coconino County Attorney's Office declined to charge and requested a supplemental report for the breath test from the Coconino County Sheriff's Office.

On October 7, 2005, not having received the requested document, the Coconino County Attorney's Office sent the entire charging packet back to the Coconino County Sheriff's Office. On November 7, 2005, the Coconino County Sheriff's Office resubmitted a complete packet to the Coconino County Attorney's Office. On February 6, 2006, the Coconino County Attorney's Office decided to charge the defendant with Aggravated DUI. On April 19, 2006, a Coconino County grand jury indicted the defendant for four counts of Aggravated DUI, which were filed on April 20, 2006.

On July 13, 2006, the state learned that the Coconino County Sheriff's Office had destroyed the dispatch tapes. It is unknown when the dispatch tapes made on March 5, 2005 were destroyed. The state learned on July 13, 2006 that the Sheriff's Office, following its policy, destroys dispatch tapes three months after they are made.

On July 18, 2006, The defendant's counsel filed a motion to dismiss the aggravated DUI counts with prejudice based on the fact that the dispatch tapes were not preserved after the March 9, 2005 letter to the Coconino County Attorney's Office.

II. LAW AND ARGUMENT

When a party violates a discovery rule, the trial court has the discretion to impose sanctions that include dismissal with or without prejudice, a continuance, contempt, or "any other appropriate sanction." Ariz. R. Crim. P. 15.7(a) (2006).

A *Willits* jury instruction is sometimes imposed as a sanction when evidence is destroyed. *See, e.g., State v. Bocharski*, 200 Ariz. 50, 59 P43, 22 P.3d 43, 52 (2001) (upholding the trial court's *Willits* instruction). In *State v. Willits*, The Arizona Supreme Court upheld the trial court's instruction to the jury that if it found that the state lost, destroyed, or did not preserve evidence that might aid the defendant and the state's explanation is inadequate, the jury could draw an inference that the evidence would have been unfavorable to the state. 96 Ariz. 184, 393 P.2d 274 (1964) (en banc). A trial court's decision to grant or deny a *Willits* instruction is reversed only if it is an "abuse of discretion." *State v. Murray*, 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995).

A. The state had no duty to preserve the dispatch tapes.

The state had no duty to preserve the dispatch tapes. The state must disclose evidence that is "material to either guilt or punishment." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The state also has a duty to preserve evidence that is "limited to evidence that might be expected to play a significant role in the suspect's defense." *California v. Trombetta,* 467 U.S. 479, 488 (1984). To be constitutionally material, the evidence's exculpatory value must have been "apparent before the evidence was destroyed" *and* the defendant must be "unable to obtain comparable evidence by other reasonably available means." *Trombetta*, 467 U.S. at 488 (internal citations omitted); *State v. Schad*, 163 Ariz. 411, 415– 416, 788 P.2d 1161–62 (1989), citing *Trombetta*; *State v. Tucker*, 157 Ariz. 433, 442, 759 P.2d 579, 588 (1988), citing *Trombetta.*

In this case, the dispatch tapes are not constitutionally material. Their exculpatory value was not "apparent" before they were destroyed and the defendant can examine the police officer or

the dispatch officer. The defendant can obtain comparable evidence by examining the deputy.

B. Dismissal is not an appropriate remedy for destruction of evidence if the defendant cannot prove bad faith conduct or actual prejudice.

The Supreme Court held that a defendant's Constitutional due process rights are not implicated when "potentially useful" evidence is destroyed unless the "defendant can show bad faith on the part of the police." *Arizona v. Youngblood (Youngblood II)*, 488 U.S. 51, 58 (1988); *Illinois v. Fisher*, 540 U.S. 544, 545, 547–48 (2004) (per curiam), quoting *Youngblood II*. This is to "limi[t] the extent of the police's obligation to preserve evidence to reasonable grounds and confin[e] it to that class of cases where the interests of justice most clearly require it." *Fisher*, 540 U.S. at 548, quoting *Youngblood II*, 488 U.S. at 58.

On the same facts, the Arizona Supreme Court held that when the state fails to preserve material that "*might* be exculpatory" and where there is no bad faith conduct, a *Willits* instruction satisfies due process under the Arizona Constitution. *State v. Youngblood (Youngblood IV)*, 173 Ariz. 502, 506–08, 844 P.2d 1152, 1156–58 (1993).

Rather, to justify dismissal when evidence whose exculpatory value is unknown is destroyed and, the defendant must prove more than the "*possibility* of prejudice" by speculating about its exculpatory value. *Youngblood IV*, 173 Ariz. at 507, 844 P.2d at 1157. **Thus, only bad faith conduct or actual prejudice is relevant to determining if a jury instruction or dismissal is appropriate.** *State v. Hill*, 174 Ariz. 313, 321–22, 848 P.2d 1375, 1383–84 (1993) (upholding trial court's denial of a *Willits* instruction because destroyed evidence's exculpatory value was unknown and defendant failed to prove bad faith conduct as required by *Youngblood IV*); *Youngblood IV*, 173 Ariz. at 506–07, 844 P.2d at 1156–57.

Youngblood IV, 173 Ariz. at 506–08, 844 P.2d at 1156–58 is one of many Arizona cases holding that a *Willits* jury instruction, not dismissal, is sometimes an appropriate remedy when evidence is lost or destroyed *and* there is no bad faith conduct or prejudice.[1]

[1] *See, e.g., State v. Fulminante*, 193 Ariz. 485, 503 PP62–63, 975 P.2d 75, 93 (1999) (upholding trial court's denial of a *Willits* instruction because defendant did not establish prejudice); *State v. Murray*, 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995)(upholding trial court's denial of a *Willits* instruction

because the defendant did not establish prejudice); *State v. Bolton*, 182 Ariz. 290, 308–09, 896 P.2d 830, 849–50(1995) (upholding trial court's denial of a *Willits* instruction because defendant did not establish prejudice); *State v. Vickers*, 180 Ariz. 521, 528 (1994) (upholding a *Willits* instruction and rejecting the defendant's due process argument because he failed to prove bad faith where the evidence was apparently destroyed "as a result of nothing more than inadvertence or neglect"); *State v. Henry*, 176 Ariz. 569, 583, 863 P.2d 861, 875 (1993) (upholding trial court's denial of a *Willits* instruction because the defendant failed to establish prejudice); *State v. Hill*, 174 Ariz. 313, 321–22, 848 P.2d 1375, 1383–84 (1993) (upholding trial court's denial of a *Willits* instruction because destroyed evidence's exculpatory value was unknown and defendant failed to prove bad faith conduct as required by *Youngblood IV*); *State v. Serna*, 163 Ariz. 260, 264, 787 P.2d 1056, 1060 (1990) (upholding the *Willits* instruction and noting that the instruction "adequately protects a defendant's due process rights where the state has destroyed or failed to preserve evidence unless the defendant is prejudiced or the state acted in bad faith"); *State v. Tucker*, 157 Ariz. 433, 441–43, 759 P.2d 579, 587–89 (1988) (upholding a *Willits* instruction and rejecting the defendant's due process argument because the defendant failed to prove bad faith conduct or prejudice); *State v. Day*, 148 Ariz. 490, 496, 715 P.2d 743, 749 (1986) (upholding the trial court's denial of a *Willits* instruction on the destruction of latent prints because the defendant failed to show bad faith or prejudice).

In *State v. Youngblood (Youngblood I)*, the Court of Appeals reversed a conviction because the police failed to preserve semen from a boy's body and clothing after the boy was sodomized, holding that the destruction violated the defendant's due process rights under the Constitution. 153 Ariz. 50, 634 P.2d 592 (App. 1986). The Supreme Court granted certiorari, reversed the Arizona Court of Appeals, and remanded, holding that destroying "potentially useful" evidence did not violate a defendant's Constitutional due process rights unless the "defendant can show bad faith." *Youngblood II*, 488 U.S. at 58.

On his second appeal, the Court of Appeals held that the destruction violated his due process rights under the Arizona Constitution. *State v. Youngblood (Youngblood III)*, 164 Ariz. 61, 790 P.2d 759 (App. 1989). The Arizona Supreme Court reversed, distinguishing the holding in *Brady v. Maryland* [2] from cases where the "unpreserved evidence . . . is neither plainly exculpatory nor inculpatory." *Youngblood IV*, 173 Ariz. at 505–06, 844 P.2d at 1155–56. This is so because the plainly exculpatory *Brady* evidence matters regardless of "whether the police exercise good faith or bad faith in failing to produce it." *Youngblood IV*, 173 Ariz. at 506, 844 P.2d at 1156. Accordingly, when a *Brady* violation occurs, the defendant gets a "new trial at which the evidence is available, not a dismissal." *Id.*

In contrast, a defendant can only argue that at most, unpreserved evidence "*might* have been exculpatory." *Id.* (emphasis in original). "Speculation is not the stuff out of which constitutional error is made." *Id.* Since the defendant in *Youngblood* received a *Willits* instruction, the Court held that his due process rights were not violated. *Youngblood IV*, 173 Ariz. at 506–07, 844 P.2d at 1156–57.

C. The holding in *Lopez* does not apply to this case.

Several years before *Youngblood* cases, the Court of Appeals used a three-part test to determine whether destroying evidence violated a defendant's due process rights:

[2] 373 U.S. 83, 87 (1963) (holding the prosecution's suppression of material "evidence favorable to an accused upon request violates [federal] due process . . . irrespective of the good faith or bad faith of the prosecution.")

> First, was the evidence material to the question of guilt or the degree of punishment;
> [S]econd, was the defendant prejudiced by its destruction; and,
> [T]hird, was the government acting in good faith when it destroyed the evidence?

State v. Lopez, 156 Ariz. 573, 574, 754 P.2d 300, 301 (App. 1987), quoting *State v. Cruz*, 123 Ariz. 497, 500, 600 P.2d 1129, 1132 (App. 1979).

The defendant's reliance on *Lopez* instead of *Youngblood IV* is misplaced. While *Youngblood IV* does not expressly overrule *Lopez*, it puts the holding in *Lopez* in doubt. *Lopez* may still apply as guidance when the defendant can prove bad faith conduct in destroying evidence that is clearly exculpatory. But *Youngblood IV* and *Fisher* plainly eviscerate the prejudice prong from the *Lopez* test. *Lopez* is also suspect since no published appellate case has even *Lopez*[3] and it is one of only two cases since implementation of the Arizona Rules of Criminal Procedure in 1975, to impose dismissal of counts as a sanction for a discovery violation.[4].

In *State v. Lopez*, police officers stopped two cars for minor violations. 156 Ariz. at 574, 754 P.2d at 300. They stopped the first car, obtained consent to inspect the first car's trunk, and found nothing. *Lopez*, 156 Ariz. at 574, 754 P.2d at 301. They then caught up to the second car, followed it, and stopped it for a crack in the windshield. *Id.* Searching the trunk, the officers found a load of marijuana. *Id.* The driver was arrested. *Id.* Three days later, the defendant's attorney sent certified letters to the Phoenix and Nogales DPS offices requesting the dispatch tapes for the day of the stop be preserved. *Id.* DPS destroyed the tapes two months later following department policy. *Id.*

The defendant filed a motion to dismiss, arguing the dispatch tapes were exculpatory evidence and destroying them violated his due process rights. *Id.* The Court of Appeals upheld the trial court's ruling, with one dissent and one special concurrence.

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[3] *State v. Gonzales-Perez*, 392 Ariz. Adv. Rep. 3, 62 P.3d 126 (App. 2003), *withdrawn and depublished by State v. Gonzales-Perez*, 205 Ariz. 257, 69 P.3d 28 (2003).

[4] The other case is *State v. Jones*, 120 Ariz. 556; 587 P.2d 742 (1978)(dismissing two counts of multiple bribery, forgery, and petty theft counts because of the state's *Brady* violation in failing to disclose evidence exculpatory on two of the counts).

Id. The Court of Appeals noted the "crucial issue" was "whether the officers had reasonable suspicion to stop" the vehicle. *Id.* The tapes "would have revealed the reasons given over the air by the officers for stopping the vehicles, the time periods involved, and the identities of the vehicles and drivers." *Lopez*, 156 Ariz. at 574–75, 754 P.2d at 301–02.The court found "sufficient facts" existed to support the conclusion that a "'reasonable possibility' existed that the evidence would have been favorable to the defendant." *Lopez*,156 Ariz. at 575, 754 P.2d at 302.

In his concurring opinion Judge Livermore noted that, for most cases, dismissing the charges with prejudice would be "too severe" and suppressing the evidence would be a more appropriate sanction. *Lopez*, 156 Ariz. at 575, 745 P.2d at 302. If the evidence is suppressed, the prosecutor should be permitted to continue the case with other evidence. *Id.* But he supported the sanction of dismissal on the facts because the "whole case stands or falls" on the evidence; "if the marijuana is suppressed . . . there is no other evidence on which to proceed." *Id.*

Lopez does not apply to this case. First, unlike *Lopez*, the dispatch tapes are not necessary to the defendant's defense. The police officer's testimony or the police report suffices as evidence that the police officer had "reasonable suspicion" to stop the defendant. Second, in this case, **unlike *Lopez*, the defendant's counsel did not send a letter directly to the police department three days after the incident to specifically preserve the dispatch tapes.**

D. The State acted in good faith.

The bad faith of *Youngblood IV* does not depend on "the centrality of the contested evidence to the prosecution's case or the defendant's defense, but on the distinction between 'material exculpatory' evidence and 'potentially useful' evidence." *Fisher*, 540 U.S. at 549. Neither does a discovery request sent before the destruction "eliminate[ ] the necessity of showing bad faith on the part of police." *Fisher*, 540 U.S. at 548.

The dispatch tapes in this case are only "potentially useful," not "materially exculpatory" to

reasonable suspicion for the stop because the defendant was arrested for speeding 20 miles per hour over the speed limit. The tapes are similarly only "potentially useful," not "materially exculpatory" for impeaching Deputy Gambee's testimony that he performed the field sobriety tests.

The defendant has failed to meet his burden of showing bad faith. The defendant cites no authority to support his assertion that the state has a duty to preserve dispatch tapes for uncharged cases. He also cites no authority that states that destroying evidence that was requested that is not materially exculpatory is bad faith. The County Attorney's Office returned the letter to the defendant's counsel and requested the counsel to resubmit it. The delay by the Coconino County Sheriff's Office is unfortunate, but was not intentional. Negligence alone does not rise to the level of bad faith, intentional conduct is required.

E. The defendant cannot prove actual prejudiced from the dispatch tapes' loss.

Under *Youngblood IV*, prejudice to the defendant is irrelevant in analyzing whether a remedy is required when evidence is destroyed. *Youngblood IV* forbids the speculation the defendant engages in. The defendant speculates the dispatch tapes might show the basis for the reasonable suspicion to stop the defendant and might show the police officer never gave the defendant sobriety tests. Even if speculative prejudice was relevant, the defendant's defense is not hindered or prejudiced by the dispatch tapes' destruction because he has other "reasonably available means" to show that there was no reasonable suspicion. He can examine the police officer or the dispatch officer. He can impeach the police officer by using his report.

III. CONCLUSION

The defendant has not proved that the police or the state acted in bad faith. His speculations do not prove the dispatch tapes were clearly exculpatory. And even if there was bad faith conduct, a *Willits* jury instruction is the appropriate remedy, not dismissal.